RECORD AND BRIEFS

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No. _____

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

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Ala. Code § 13A-11-72 4

OTHER AUTHORITIES

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1 Annals of Cong. 753 (1789) 7

4 William Blackstone, Commentaries on the Laws of England 329 (1768) 7

Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995) 15, 16

The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 2003) 9, 10

J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956) 7

2 William Hawkins, *A Treatise of the Pleas of the Crown* 515 (John Curwood ed., 8th ed. 1824) 7

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PETITION FOR A WRIT OF CERTIORARI

Terance Martez Gamble respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 694 F. App'x 750. The District Court's opinion denying Gamble's motion to dismiss is not published, but it is available at 2016 WL 3460414.

JURISDICTION

The Eleventh Circuit entered judgment on July 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

The Fifth Amendment enshrines a promise that "No person shall . . . be twice put in jeopardy" "for the same offence." Yet Terance Martez Gamble has been subjected to exactly that: two convictions, and two sentences, for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of

his life behind bars. The Double Jeopardy Clause prohibits that result.

The fact that Gamble's sentences were imposed by separate sovereigns—Alabama and the United States—should make no difference. The court-manufactured "separate sovereigns" exception—pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law. For precisely these reasons, Justices Ginsburg and Thomas have called for "fresh examination" of the exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring); *see also id.* ("The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA."). And courts and commentators have agreed that the exception's time has come.[1]

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[1] *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting) (rejecting the proposition that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State"); *United States v. Wilson*, 413 F.3d 382, 394 (3d Cir. 2005) (Aldisert, J., dissenting) ("The time has come for the Supreme Court to revisit the issue[.]"); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (arguing that the exception "is in need of serious reconsideration"); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 17, 23 & n.102 (1997) (encouraging this Court to "abolish the dual sovereign exception" and collecting legal commentary to the same effect).

But, as is often the case when binding precedent from this Court forecloses a line of argument, cases raising this issue have been few and far between. And those few to have raised it have been riddled with vehicle problems. *See, e.g.*, *Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari).

Until now. This case cleanly and squarely presents the question two members of this Court have already evinced an intent to review. And Terance Gamble ought not be made to serve three more years in prison in violation of his constitutional rights. This Court should grant certiorari, overrule the separate-sovereigns exception, and restore the original meaning of the Double Jeopardy Clause.

STATEMENT OF THE CASE

1. In 2008, Terance Gamble was convicted of second-degree robbery in Mobile County, Alabama. C.A. App. 12, 37. Because second-degree robbery is a felony offense, both federal and state law forever barred him from possessing a firearm.

2. More than seven years later, on November 29, 2015, Gamble was driving in Mobile when a police officer pulled him over for a faulty tail light. *See* C.A. App. 49–50. The officer smelled marijuana coming from Gamble's car and, after searching it, discovered two baggies of marijuana, a digital scale, and a 9mm handgun. *Id.*

3. Alabama prosecuted Gamble for possessing marijuana and for being a felon in possession of a firearm. The State's felon-in-possession statute, under which Gamble was convicted, "prohibits a convicted felon from possessing a pistol." *Ex parte*

Taylor, 636 So. 2d 1246, 1246 (Ala. 1993); *see* Ala. Code §§ 13A-11-70(2), 13A-11-72(a); Pet. App. 5a-6a. Gamble received a one-year sentence, which he finished serving on May 14, 2017.

4. While the State's prosecution was ongoing, the federal government charged Gamble for the same offense under federal law: being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). The federal statute prohibits convicted felons from "possess[ing] in or affecting commerce[ ] any firearm." *Id.* The government based this charge on "the same incident of November 29, 2015 that gave rise to his state court conviction." Pet. App. 6a; *see also* C.A. App. 12.

Gamble raised one and only one objection to his federal prosecution: that it violated his "Fifth Amendment [right] against being placed twice in jeopardy for the same crime." C.A. Supp. App. 10. And he moved to dismiss his federal indictment on that ground. *Id.*

The District Court, in a thorough opinion, denied Gamble's motion (as it was bound to do) on the basis of this Court's separate-sovereigns exception. "[U]nless and until the Supreme Court overturns" that doctrine, the District Court reasoned, "Gamble's Double Jeopardy claim must likewise fail." Pet. App. 10a.

Gamble then entered a conditional guilty plea, specifically preserving his right to appeal the District Court's denial of his double-jeopardy claim. C.A. App. 33, 45–46. He was sentenced to 46 months' imprisonment, a three-year period of supervised release, and a $100 assessment. *Id.* at 15–20. He is set to be released from federal prison on February 16,

2020—nearly three years after he would have been released from state prison.

5. Gamble appealed the "issue preserved in writing in his Plea Agreement and preserved on the record at his Plea Hearing"—namely, whether the federal prosecution violated "his rights pursuant to the Double Jeopardy clause of the Fifth Amendment." C.A. Supp. App. 12. The Eleventh Circuit issued a *per curiam* opinion affirming the decision below. "[U]nless and until the Supreme Court overturns" the separate-sovereigns exception, the court reasoned, Gamble's "double jeopardy claim must fail." Pet. App. 9a.

This petition followed.

REASONS FOR GRANTING THE PETITION

The separate-sovereigns exception to the Double Jeopardy Clause should be overruled. Indeed, the exception flunks every test of constitutional interpretation. It has no basis in the text of the Fifth Amendment. It is inconsistent with the Clause's original meaning, which derived from a long common-law tradition that explicitly extended to prosecutions by separate sovereigns. It is irreconcilable with the Clause's driving purpose, which is to ensure finality by protecting individuals from the threat or reality of successive prosecutions. And it distorts foundational precepts of federalism, pursuant to which our system of dual sovereignty is supposed to protect individual liberty rather than take it away.

Nor should considerations of *stare decisis* stand in the way. The separate-sovereigns exception's doctrinal premise—that the Double Jeopardy Clause did not apply to the States—eroded away when the

Clause was incorporated. And its factual premise—that duplicative federal-state prosecutions would be exceedingly rare in light of the narrow scope of federal criminal law—no longer holds. These sorts of doctrinal and factual changes are classic grounds for reconsidering legal doctrines that, like this one, have outlasted their foundations.

This case presents the ideal vehicle for reconsidering the separate-sovereigns exception. Gamble took great care to preserve this issue at every step of the way. And no other procedural or substantive obstacle impedes this Court's review. That is no small thing, as a clean vehicle for revisiting this question has proven hard to come by.

In sum, the separate-sovereigns exception to the Double Jeopardy Clause "bears fresh examination." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring), and this is the "appropriate case" in which to do it. *Id.*

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED.

A. The Separate-Sovereigns Exception Is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The text of the Double Jeopardy Clause of the Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause admits of no distinctions based on the identity of the prosecuting entity. To the contrary, it unambiguously protects each "person" from duplicative prosecutions—regardless of their source.

2. Evidence of the Clause's original meaning overwhelmingly supports this reading. The Double Jeopardy Clause has its origins in "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 329 (1768). The Founders took the core promise of the Clause as a given: "[T]he courts of justice," they assumed, "would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 753 (1789) (statement of Representative Roger Sherman). To the contrary, "it [was] the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* (statement of Representative Samuel Livermore).

The rule "that an acquittal or conviction by a court of competent jurisdiction abroad"—*i.e.*, by a separate sovereign—"is a bar to a prosecution for the same offense in England had been definitely settled . . . prior to the American revolution." J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 (1956); *see also, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 515, 522 (John Curwood ed., 8th ed. 1824) (explaining that double-jeopardy protections apply to prosecutions "in any court whatsoever"). Accordingly, an acquittal or conviction in, say, Portugal or Wales, had long barred a subsequent prosecution in England. *See King v. Hutchinson* (1678) 84 Eng. Rep. 1011, 1011 (Portugal); *King v. Thomas* (1664) 83 Eng. Rep. 326, 327 (Wales). Indeed, early decisions by this Court appeared to recognize the common-law doctrine's

application to prosecutions by separate sovereigns. *See Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) ("The exercise of this jurisdiction by a State Court Martial would either oust the United States' Courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offence.").

The Double Jeopardy Clause was meant to codify this broad common-law doctrine in which a separate-sovereigns exception had no place. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (explaining that the purpose of the Clause is "to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").

3. The purpose of the Double Jeopardy Clause likewise extends to prosecutions by separate sovereigns. At its core, the Clause reflects a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). To that end, it protects individuals "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* at 187–88; *see also Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield

individuals from the harassment of multiple prosecutions for the same misconduct.").

The separate-sovereigns exception cannot be reconciled with that motivating purpose. To the contrary, permitting consecutive prosecutions for the same offense whenever those prosecutions are initiated by different sovereigns implicates the very finality and fairness concerns the Clause was designed to address. After all, "[i]f double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting); *see also Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (explaining that the separate-sovereigns exception "hardly serves" the Double Jeopardy Clause's "objective"). The exception forces defendants like Gamble—who have already been convicted or acquitted of an offense—to " 'run the gauntlet' a second time." *Abney v. United States*, 431 U.S. 651, 662 (1977). That is precisely the result the Double Jeopardy Clause was designed to prevent.

4. What is more, the separate-sovereigns exception runs afoul of foundational concepts of federalism. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). In other words, our system of dual sovereignty was meant to "secure[ ] to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 221 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)); *see also* The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003)

(explaining that division of power "between two distinct governments" would afford "a double security . . . to the rights of the people").

The separate-sovereigns exception turns federalism on its head. The mechanism through which federalism enhances liberty was, to the Founders, straightforward: "The different governments will control each other, at the same time that each will be controlled by itself." *Id.* In the teeth of the separate-sovereigns exception, however, dual sovereignty does precisely the opposite: It permits different governments "to do together what . . . neither can do separately"—all to the detriment of individual liberty. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

Gamble's is a case in point. Far from enhancing his freedoms and securing his liberty, the constitutional division of sovereign power has cost him three years of his life. After all, had the "atom of sovereignty" never been split, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), Gamble's dual convictions would never have been possible and he would be a free man today. That result is incompatible with the text of the Double Jeopardy Clause, with the Clause's original meaning, and with the original purpose of the Clause and federalism more broadly.

B. The Separate-Sovereigns Exception's Doctrinal and Factual Underpinnings Have Eroded.

1. True, this Court has previously endorsed the separate-sovereigns exception. But "*stare decisis* cannot possibly be controlling when . . . the decision

in question has . . . [had] its underpinnings eroded . . . by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Put differently, *stare decisis* must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992).

Those standards could have been written for this case. The separate-sovereigns exception's original doctrinal "underpinnings," *Gaudin*, 515 U.S. at 521—the jurisprudential assumption that the Double Jeopardy Clause did not apply to the States—dissolved when this Court incorporated it. And incorporation of other constitutional provisions has led this Court to overrule separate-sovereigns exceptions in other contexts, leaving this one an outlier "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

a. The separate-sovereigns exception has its origins in this Court's 1847 decision in *Fox v. Ohio*, 46 U.S. 410 (1847). That case marked the Court's first intimation that state and federal governments could separately prosecute the same offense. *Id.* at 434–35. The decision, which predated the Fourteenth Amendment, relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), which had held that the Bill of Rights did not apply to the States. *See Fox*, 46 U.S. at 434–35. The Double Jeopardy Clause would not bar duplicative state and federal convictions because, the Court reasoned, the Clause was "exclusively [a] restriction[ ] upon federal power." *Id.* at 434.

In subsequent cases, the Court relied on *Fox* in adopting and refining early versions of the separate-sovereigns exception. *See, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 20 (1852); *United States v. Lanza*, 260 U.S. 377, 378–79, 382–83 (1922). The doctrine fully crystallized in a pair of 1959 cases, *Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. at 196, which blessed, respectively, state prosecution following a federal conviction and federal prosecution following a state acquittal. Although *Bartkus* and *Abbate* postdated adoption of the Fourteenth Amendment, this Court had already rejected the notion that the passage of that Amendment had incorporated the Double Jeopardy Clause against the States. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937). And, as in *Fox*, the absence of any double-jeopardy limitation for the States was a key premise of the Court's rulings. *See Bartkus*, 359 U.S. at 124 ("[T]he Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments[.]"); *Abbate*, 359 U.S. at 194 ("The Fifth Amendment . . . applies only to proceedings by the Federal Government[.]").[2]

The separate-sovereigns line of authority, accordingly, is deeply rooted in the absence of a double-jeopardy bar for the States. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law*

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[2] In occasionally applying the exception since *Abbate*, the Court has simply assumed, without squarely deciding, that the exception remains valid. *See Sanchez Valle*, 136 S. Ct. at 1870; *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985); *United States v. Wheeler*, 435 U.S. 313, 321–22 (1978); *Waller v. Florida*, 397 U.S. 387, 394 (1970).

After Rodney King, 95 COLUM. L. REV. 1, 11 (1995) ("[T]he logic of [*Barron*] furnished an important justification for the early dual sovereignty doctrine[.]").

b. In 1969, however, the Court vaporized the doctrinal underpinnings of the separate-sovereigns exception when it incorporated the Double Jeopardy Clause against the States. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969). "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," the Court held, so it "should apply to the States through the Fourteenth Amendment." *Id.* at 794.

With the Clause now applicable to the States, nothing of the separate-sovereigns exception's "important predicate" remained. *United States v. Grimes*, 641 F.2d 96, 101–02 (3d Cir. 1981). To the contrary, the logic of incorporation is incompatible with such an exception. "Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone." *Id.*

c. For that very reason, this Court overruled separate-sovereigns exceptions to other constitutional doctrines in the wake of incorporation of the relevant constitutional protections. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court overruled its prior holding that federal prosecutors could use evidence unlawfully obtained by state officers. *Id.* at 213. That doctrine's "foundation," the Court

reasoned, had "disappeared" when the Court incorporated the Fourth Amendment against the States. *Id.* Likewise, in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. *Id.* at 57. The incorporation of the Fifth Amendment's privilege against self-incrimination, the Court reasoned, "necessitate[d] a reconsideration" of that doctrine. *Id.*

d. The separate-sovereigns exception to the Double Jeopardy Clause should meet the same fate for the same reason—*i.e.*, the Court should overrule the exception because incorporation eroded its doctrinal underpinnings. *See Grimes*, 641 F.2d at 101 ("[A]n important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments."). The double-jeopardy separate-sovereigns exception has become "the kind of doctrinal dinosaur or legal last-man-standing" for which a departure from *stare decisis* is more than justified. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015).

2. Just as doctrinal erosion can support a departure from *stare decisis*, so too can factual shifts. Specifically, a precedent should give way when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855; *see also, e.g. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, (1932) (Brandeis, J., dissenting) ("[T]his court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with

facts newly ascertained[.]"). The dramatic expansion of federal criminal law in the years since the separate-sovereigns exception is exactly the kind of seismic shift that calls for reevaluation of doctrines, like the separate-sovereigns exception, premised on the old regime.

a. Again, consider the foundational decision in *Fox*, 46 U.S. 410. There, in indicating that successive prosecutions by separate sovereigns would be permissible, the Court attested to its belief that such prosecutions would occur only in the most exceptional circumstances:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

Id. at 435.

At the time, that expectation—that duplicative state and federal convictions would be exceedingly rare—was entirely reasonable. For centuries, federal and state criminal justice systems operated with next to no overlap, with state criminal law covering most of the ground and federal criminal law limited to narrowly defined federal interests. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138–40 (1995). And, as a result, there was "little, if

any, official coordination" between state and federal prosecutors. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 205 (2011).

b. It would be an understatement to say that the game has changed. Federal criminal law has ballooned to the extent that "the federal government has [now] duplicated virtually every major state crime." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997); *see* Brickey, *supra*, 1140–45 (describing the expansion of federal criminal law over time). As a result and of necessity, "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995); *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31-32 (2011).

c. These dramatic changes have eliminated a factual predicate of the separate-sovereigns exception—*i.e.*, that instances of duplicative prosecutions would be few and far between and, relatedly, that opportunities for state-federal collusion to a defendant's detriment would be limited. "The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions." Meese, *supra*, 3. Increasing state-federal cooperation, too, renders the separate-sovereigns exception far more problematic than the Court could have anticipated. *See* Amar, *supra*, 48 ("[I]n a world where federal and state governments generally are presumed to, and do

indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed.").

Gamble's is, again, a case in point. Whereas *Fox* anticipated that duplicative prosecutions would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor," 46 U.S. at 435, Gamble faced duplicative prosecutions for a mine-run offense. According to the United States Sentencing Commission, convictions involving "illegal possession of a firearm, usually by a convicted felon" accounted for more than half of the 7,305 federal firearms convictions in fiscal year 2016. United States Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2016* 8–9. The *Fox* Court did not anticipate—and, given the facts on the ground, could not reasonably have anticipated—that such common offenses would admit of duplicative federal and state prosecutions. To the contrary, it took as its premise a state of affairs that no longer exists. The separate-sovereigns exception has thus outlived the world that birthed it. A "fresh examination" is more than warranted. *Sanchez-Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring).

II. THIS CASE IS AN IDEAL VEHICLE.

1. This case is as clean a vehicle as the Court will ever get for taking up this question. Gamble raised only one defense to his federal conviction—that it violated the Double Jeopardy Clause. When the District Court denied Gamble's motion to dismiss his indictment on that ground, Gamble expressly preserved his right to raise this issue on appeal. He

then duly raised it on appeal before the Eleventh Circuit. Both decisions below hinged exclusively on the validity of this Court's separate-sovereigns exception. Neither the District Court nor the Court of Appeals even hinted that any procedural bar or other substantive issue impacted (or could have impacted) their decisions, or that there is any basis for maintaining Gamble's federal conviction if this Court overrules the separate-sovereigns exception. If ever there were a clean vehicle for revisiting the separate-sovereigns exception, this is it.

2. It is not every day that this Court is presented with a clean vehicle on this issue. Gamble's counsel is aware of just two petitions purporting to present this question since Justices Thomas and Ginsburg called for reconsideration of the issue. The first was denied after respondent raised a number of vehicle problems. *See Walker*, 137 S. Ct. 1813 (denying certiorari). The second remains pending before this Court. *See Tyler v. United States*, No. 17-5410. While *Tyler* may be a suitable vehicle, it arises in an interlocutory posture and has a complex procedural history. *See United States v. Tyler*, 220 F. Supp. 3d 563, 570–71 (M.D. Pa. 2016).[3]

Here, Gamble preserved the question presented at every turn, and that question is undeniably outcome determinative. He has no other defense; proceedings are otherwise complete; and neither court below

[3] If the Court grants certiorari in *Tyler* (or any other case presenting this question), it should hold this case. If the Court proceeds to reject the separate-sovereigns exception, it should grant this petition, vacate the decision below, and remand for further proceedings.

suggested any alternative ground, procedural or substantive, for denying his motion to dismiss. In short, Terance Gamble is sitting in prison because of the separate-sovereigns exception; overruling that exception would set him free. This is the "appropriate case" Justices Ginsburg and Thomas envisioned. *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). The Court should not pass it up.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 24, 2017

APPENDIX

APPENDIX A

694 Fed.Appx. 750 (Mem)
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Terance Martez GAMBLE, Defendant-Appellant.

No. 16-16760
|
Non-Argument Calendar
|
(July 28, 2017)

Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:16-cr-00090-KD-B-1

Attorneys and Law Firms

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Barre Clark Dumas, Dumas & McPhail, LLC, Mobile, AL, for Defendant-Appellant

Before HULL, WILSON, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Terance Martez Gamble appeals his conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Gamble argues that the district court erred by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama.

We review *de novo*, as a pure question of law, any possible violation of the Double Jeopardy Clause. *United States v. McIntosh*, 580 F.3d 1222, 1226 (11th Cir. 2009).

The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns. *Abbate v. United States*, 359 U.S. 187, 195, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). We have followed the precedent set by *Abbate* in *Hayes*, stating that unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine. *United States v. Hayes*, 589 F.2d 811, 817-18 (5th Cir. 1979). We have, more recently, stated that "[t]he Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct."

United States v. Bidwell, 393 F.3d 1206, 1209 (11th Cir. 2004).

In *Sanchez-Valle*, the Supreme Court stated that the states were separate sovereigns from the federal government because the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Puerto Rico v. Sanchez Valle*, 579 U.S. – ——, ——, 136 S.Ct. 1863, 1871, 195 L.Ed.2d 179 (2016). It explained that prior to forming the Union, the States possessed separate and independent sources of power and authority, which they continue to draw upon in enacting and enforcing criminal laws. *Id.* State prosecutions therefore have their most ancient roots in an "inherent sovereignty" unconnected to, and indeed pre-existing, the U.S. Congress. *Id.* The Supreme Court differentiated Puerto Rico from the States, stating that it was not a sovereign distinct from the United States because it had derived its authority from the U.S. Congress. *Id.* at 1873-74. It concluded that the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws. *Id.* at 1876.

The district court did not err by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama, because based on Supreme Court precedent, dual sovereignty allows a state government and the federal government to prosecute an individual for the same crime, when the States rely on authority originally belonging to them

before admission to the Union and preserved to them by the Tenth Amendment. Accordingly, we affirm.

AFFIRMED.

All Citations

694 Fed.Appx. 750 (Mem)

APPENDIX B

United States District Court,
S.D. Alabama, Southern Division.

United States of America,
v.
Terance Gamble, Defendant.

Criminal Action No. 16-00090-KD-B
|
Signed 06/20/2016
|
Filed 06/21/2016

ORDER

KRISTI K. DuBOSE, UNITED STATES DISTRICT JUDGE

This action is before the Court on Defendant Terance Gamble's motion to dismiss the Indictment and memorandum in support (docs. 18, 19).[1] Upon consideration and for the reasons set forth herein, the motion to dismiss is denied.

On May 27, 2016, Gamble was convicted in the Mobile County, Alabama Circuit Court, Criminal Action No. 2016-2740, as a prohibited person in

[1] Defendant's motion for leave to file the motion to dismiss beyond the time set in the Pretrial Order (doc. 17) is GRANTED.

possession of a firearm in violation of Ala. Code § 13A-11-72. Now, in consideration of the same incident of November 29, 2015 that gave rise to his state court conviction, he has been indicted in the district court for violation of 18 U.S.C. § 922(g)(1) as a prohibited person in possession of a firearm.

Gamble argues that the dual prosecution by this Court and the State of Alabama subjects him to Double Jeopardy. He relies upon the recent decision in *Commonwealth of Puerto Rico v. Sanchez-Valle*, ___ S. Ct. ____, 2016 WL 3189527 (June 9, 2016), wherein the Supreme Court held that the Double Jeopardy Clause barred the United States and Puerto Rico from separately prosecuting Sanchez-Valle for the same conduct under equivalent criminal laws because the Commonwealth of Puerto Rico and the United States were not separate sovereigns. More specifically, Gamble relies upon the concurrence of Justice Ginsberg, joined by Justice Thomas, for the premise that dual sovereign prosecutions "warrant attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA." *Id.* at *11. Gamble asserts that "the sovereignty of the United States derives from the people", and "[t]hose same people, at least a sub-group of them, to wit the people of Alabama, confer authority on their state." Thus, he argues "the people cannot prosecute two times for the same offense" (doc. 19, p. 3).

The following is binding precedent that dictates the Court's decision. In *United States v. Hayes*, 589 F. 2d 811 (5th Cir. 1979), the Fifth Circuit held as follows:

> Appellant's first group of arguments concern the validity of the federal prosecution in light of the

previous state prosecution. First, appellant urges this court to abandon the well-established rule that there is no constitutional bar to successive state and federal prosecutions for the same criminal conduct. The leading cases in this area are *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) and *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). In *Abbate*, the defendant had first been tried and convicted in an Illinois court for conspiring to damage another's property and had been sentenced to three months imprisonment. He was subsequently prosecuted by the federal government for conspiring to destroy communications facilities operated or controlled by the United States, 18 U.S.C. s 1362 (1964). *Bartkus* involved a defendant who was convicted of armed robbery under Illinois law, after having been acquitted by a federal jury of robbing a federally insured savings and loan association, 18 U.S.C. § 2113 (1964). The Court reasoned that to outlaw successive prosecution would enable one sovereign to interfere with the administration of the other's criminal law. The classic formulation of this "dual sovereignty" concept states:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

United States v. Lanza, 260 U.S. 377, 382, 43 S.Ct. 141, 142, 67 L.Ed. 314 (1922).

While the Court has consistently expressed concern over the possible abuses of dual prosecutions, *See Bartkus v. Illinois*, 359 U.S. 121, 138, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) ("the greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy"); *United States v. Lanza*, 260 U.S. 377, 383, 43 S.Ct. 141, 67 L.Ed. 314 (1922) ("in the benignant spirit" in which the federal system is administered, defendants should be subject to dual state-federal prosecutions only "in instances of peculiar enormity"). Quoting *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434, 12 L.Ed. 213 (1847), and while the *Lanza-Abbate-Bartkus* doctrine has met harsh criticism, *See, e.g.*, Harrison, Federalism and Double Jeopardy; A Study in the Frustration of Human Rights, 17 U. Miami L.Rev. 306 (1963); Fisher, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591, 599 (1961); Grant, The Lanza Rule of Successive Prosecutions, 32 Colum.L.Rev. 1309, 1329 (1932), the doctrine has nonetheless been applied consistently by the Circuit Courts. *See, e.g., United States v. Harris*, 551 F.2d 621 (5th Cir.), Cert. denied, 434 U.S. 836, 98 S.Ct. 125, 54 L.Ed.2d 98 (1977); *United States v. Cordova*, 537 F.2d 1073, 1075 (9th Cir.), Cert. denied, 429 U.S. 960, 97 S.Ct. 385, 50 L.Ed.2d 327 (1976); *United States v. Villano*, 529 F.2d 1046, 1061 (10th Cir.), Cert. denied, 426 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1193 (1976); *United States v. Johnson*, 516 F.2d 209, 212 (8th Cir.), Cert. denied, 423 U.S. 859, 96 S.Ct. 112, 46 L.Ed.2d 85 (1975); *United States v. Barone*, 467 F.2d 247, 250 (2d Cir. 1972). Moreover, the Supreme Court has recently

reaffirmed the dual sovereignty doctrine. *See United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (Indian tribe and federal government are dual sovereigns); *Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (dictum) (dual sovereignty principle is inherent in the federal system). Unless and until the Supreme Court overturns *Abbate*, appellant's double jeopardy claim must fail.

United States v. Hayes, 589 F.2d 811, 817-18 (5th Cir. 1979); *See also Lloyd v. Marshall*, 525 Fed.Appx. 889, 892 (11th Cir. 2013) ("Lloyd's argument that his prosecution in the federal and state courts violated the Double Jeopardy Clause lacks merit[.]") (citing *Abbate v. United States*, 359 U.S. 187, 189–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959)); *United States v. Morgan*, 337 Fed.Appx. 798, 800 (11th Cir. 2009) ("Morgan argues that the instant prosecution violated his right against double jeopardy because he was previously convicted in Fulton County, Georgia of the same felon-in-possession offense. The argument fails, however, because, as he properly concedes, the Supreme Court has rejected it.") (citing *Abbate v. United States*, 359 U.S. 187, 189–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959)); *United States v. Harden*, 37 F.3d 595, 598 (11th Cir. 1994) ("[T]he United States Attorney has prosecutorial discretion even if a case is first referred for state prosecution because a defendant may be prosecuted and convicted under a federal statute following conviction in state court for the same conduct without violating due process.") (citing *Abbate v. United States*, 359 U.S. 187, 190–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959))); *United States v. Brown*, 186 Fed.Appx. 914, 918 (11th

Cir. 2006) ("Furthermore, '[t]he Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct.' ") (quoting *United States v. Bidwell*, 393 F.3d 1206, 1209 (11th Cir. 2004)).

Accordingly, unless and until the Supreme Court overturns *Abbate*, Gamble's Double Jeopardy claim must likewise fail.

DONE and **ORDERED** this 20th day of June 2016.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3460414